HONG XIN CONSTRUCTION SDN BHD v. REBANA MAJU SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NO: WA-24C-5-01-2023]
26 JULY 2024

Abstract – *One of the duties and obligations of the adjudicator in an adjudication proceeding is to comply with the principles of natural justice (s. 24 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA')). Natural justice in the context of s. 15(b) of the CIPAA refers to the second pillar of natural justice that the parties must be given adequate notice and opportunity to be heard. The line of enquiry which is undertaken by the courts in determining whether there is a denial of natural justice is to consider the manner in which the adjudicator conducted the hearing and whether he had accorded procedural fairness to the parties. When an adjudicator acts in excess of jurisdiction and makes a decision without explaining his reasoning, this certainly falls short of the duty under s. 12(4) of the CIPAA to provide reasons for the adjudicator's findings.*

CONSTRUCTION LAW: *Adjudication – Proceedings – Adjudication decision – Setting aside – Application for – Whether adjudicator acted in excess of jurisdiction – Whether s. 12(4) of Construction Industry Payment and Adjudication Act 2012 complied with – Principles of natural justice – Whether complied – Whether grounds established to set aside adjudication decision*

CIVIL PROCEDURE: *Setting aside – Application for – Application to set aside adjudication decision – Whether adjudicator acted in excess of jurisdiction – Whether s. 12(4) of Construction Industry Payment and Adjudication Act 2012 complied with – Principles of natural justice – Whether complied – Whether grounds established to set aside adjudication decision*

The plaintiff was in the contracting business while the defendant was a property developer. By a letter of award ('LoA'), the defendant awarded the plaintiff the contract for the construction and completion of the main building works for a project ('project'). The contract sum was RM92,356,854.10 with RM56,115,454 to the plaintiff, RM34,241,400 to the nominated sub-contractors ('NSC') and a contingency sum of RM2,000,000. The parties agreed that the agreement and conditions of PAM Contract 2006 (With Quantities) ('PAM contract') shall form part of the contract made between them. A dispute arose between the parties due to, among others, the purported non-payment of the sums certified in interim certificates Nos. 30 to 37 issued by the plaintiff to the defendant from September 2021 to April 2022 amounting to RM9,208,150.21,

notwithstanding that the 60-day honouring period of each interim certificate had lapsed. In an adjudication proceeding, the adjudicator dismissed the plaintiff's claim. The plaintiff applied to set aside the adjudication decision ('AD') on the following grounds: (i) that the adjudicator had acted in excess of jurisdiction when he: (a) decided that Progress Claim No. C 38 ('PC 38') was not due for payment, but yet he proceeded to assess the parties' submissions and concluded that the plaintiff had not proven its case for measurement of quantities and claim for loss and expense and retention sum ('first ground (a)'); and (b) allowed the set-off for the refund of RM8,420,854.71 ('first ground (b)'); (ii) that that there was a denial of natural justice and a breach of s. 12(4) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') when the adjudicator refused to award the sum of RM562,802.24 to the plaintiff on account that the effective date of the transfer of contra units was not yet due without giving any or sufficient reasons ('second ground'); and (iii) that the adjudicator acted in excess of jurisdiction and/or in breach of the second rule of natural justice in allowing the defendant's claim for the purported rectification of defective works amounting to RM7,877,832 ('third ground').

Held (allowing setting aside application):

(1) PC 38 was the final account prepared by the plaintiff consequent to the plaintiff's notice of own determination dated 25 April 2022 ('25 April 2022 notice') in accordance with clause 26.2 of the PAM contract following the defendant's purported failure to make payments for the certificate of payment within the stipulated time. The defendant's payment response merely denied the plaintiff's claims and allegations in the payment claim which were said to be baseless and completely misconceived, and without full and complete particulars being given by the plaintiff. The payment response also mentioned the defendant's notice of arbitration which was awaiting a response from the plaintiff. The allegation of a premature claim by the plaintiff was raised by the defendant in the adjudication response, and the adjudicator had addressed the said contention, rightly finding that PC 38 was not due for payment as at the date of service of the payment claim. As PC 38 was not due for payment as of the date of service of the payment claim, the adjudicator's conclusion, as a result of his analysis of the parties' submissions on the issues relating to measurement of quantities, and the claims for loss and expense and retention sum where he decided that the plaintiff had failed to prove these claims, and he declined to award the sums in PC 38 to the plaintiff, could not stand as it was made in excess of his jurisdiction. The plaintiff had established the ground to set aside the AD as per the first ground (a). (paras 31, 41, 42, 45 & 47)

(2) The defendant's cause of action arose at the time when the debt could first have been recovered by action, namely when the alleged payment was made on 28 April 2022. However, the plaintiff had issued the 25 April 2022 notice. The adjudicator did not carry out any analysis with a view of making a finding as to whether the plaintiff's determination of the contract was invalid and unlawful as alleged by the defendant in the adjudication response. This was a relevant enquiry because, if the plaintiff's termination of the contract was valid, the defendant's cause of action only accrued after the said termination. In fact, by finding that the defendant had three months to indicate its agreement or otherwise to the plaintiff's final account and that PC 38 was premature, the adjudicator appeared to have accepted that the plaintiff's termination of the contract was valid and was based on an alleged overpayment. The plaintiff had similarly proven, on a balance of probabilities, first ground (b). The adjudicator had acted in excess of jurisdiction when he allowed the sum of RM8,420,854.71 to be treated as a valid and rightful set-off in respect of the plaintiff's claims in the adjudication proceedings. (paras 51 & 52)

(3) One of the duties and obligations of the adjudicator is to comply with the principles of natural justice (s. 24(c) of the CIPAA). It is well accepted that natural justice in the context of s. 15(b) of the CIPAA refers to the second pillar of natural justice that the parties must be given adequate notice and opportunity to be heard. The line of enquiry which is undertaken by the courts in determining whether there is a denial of natural justice is to consider the manner in which the adjudicator conducted the hearing and whether he had accorded procedural fairness to the parties. Whilst the adjudicator appeared to have considered the respective submissions of the parties, there was merit to the plaintiff's complaint that the adjudicator failed to give adequate or sufficient reasons in finding that the parties' conduct did not amount to a variation of the express written terms. The adjudicator had merely said that he was not persuaded by the plaintiff's contention without explaining his reasoning. This fell short of the duty under s. 12(4) of the CIPAA to provide reasons for the adjudicator's findings in respect of the second issue which he had identified in the AD. The plaintiff had established the second ground in the setting aside application on a balance of probabilities. (paras 53-66)

(4) By not deciding on the validity of the 25 April 2022 notice, the question arose as to whether the defendant was entitled to claim for rectification of all defective works in the 18 non-compliance reports. In the event the plaintiff rightfully determined the contract, the plaintiff would not have been able to carry out the rectification works as vacant possession of the

site had been handed back to the defendant. It was imperative for the adjudicator to decide on the legality of the 25 April 2022 notice and the defendant's termination notice before ruling on the defendant's entitlement for rectification of defective works. The adjudicator had no jurisdiction to decide on the defendant's entitlement for rectification of defective works without first deciding on the legality of the plaintiff's determination of its own employment. Hence, the adjudicator had acted in excess of jurisdiction in allowing the defendant's claim for RM7,877,832. (paras 71 & 72)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] CLJU 1522; [2016] 1 LNS 1522 CA ***(refd)***

Anas Construction Sdn Bhd v. JKP Sdn Bhd & Another Appeal [2024] 2 CLJ 665 FC ***(refd)***

ATSA Architects Sdn Bhd v. Teguh Majuria Sdn Bhd & Other Cases [2022] CLJU 3037; [2022] 1 LNS 3037 HC ***(refd)***

Bauer (Malaysia) Sdn Bhd v. Jack-In Pile (M) Sdn Bhd & Another Appeal [2018] 10 CLJ 293 CA ***(refd)***

Bertam Development Sdn Bhd v. R & C Cergas Teguh Sdn Bhd [2017] CLJU 1556; [2017] 1 LNS 1556 HC ***(refd)***

BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case [2016] CLJU 1096; [2016] 1 LNS 1096 HC ***(refd)***

Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd And Other Cases [2022] CLJU 1842; [2022] 1 LNS 1842 HC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Ireka Engineering And Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal [2019] CLJU 51; [2019] 1 LNS 51 CA ***(refd)***

JEKS Engineering Sdn Bhd v. PALI PTP Sdn Bhd & Another Case [2021] CLJU 1406; [2021] 1 LNS 1406 HC ***(refd)***

JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal [2022] 10 CLJ 528 CA ***(refd)***

MRCB Sentral Properties Sdn Bhd v. GSIB Sdn Bhd & Another Case [2021] MLJU 2249 ***(refd)***

Nasri v. Mesah [1970] CLJU 85; [1970] 1 LNS 85 FC ***(refd)***

Naza Engineering & Construction Sdn Bhd v. SSL Dev Sdn Bhd [2019] CLJU 2331; [2019] 1 LNS 2331 HC ***(refd)***

PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd & Other Cases [2018] CLJU 1459; [2018] 1 LNS 1459 HC ***(refd)***

Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***

PJ Midtown Development Sdn Bhd v. Pembinaan Mitrajaya Sdn Bhd & Another Case [2020] CLJU 1254; [2020] 1 LNS 1254 HC ***(refd)***

SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd [2019] 2 CLJ 704 HC ***(refd)***

Syarikat Bina Darul Aman Bhd & Anor v. Government Of Malaysia [2018] 4 CLJ 248 HC ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd And Another Case [2017] CLJU 177; [2017] 1 LNS 177 HC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***
Wabina Constructions & Engineering Sdn Bhd v. Fulloop Sdn Bhd & Other Cases [2022] CLJU 2608; [2022] 1 LNS 2608 HC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 5, 6, 12(4), 13, 15(b), (d), 16(1)(a), 24(c), 27(1), (2), (3), 28
Rules of Court 2012, O. 69A, rr. 2, 3, 4, 7

Other source(s) referred to:
Lam Wai Loon and Ivan YF Loo, *Construction Adjudication In Malaysia*, 3rd edn, Sweet & Maxwell, 2022, pp 283-284 & 430-433

For the plaintiff - Gan Khong Aik & Wilson Pang; M/s Gan Partnership
For the defendant - Ong Swee Long & Isaac Wong Ang Ke; M/s Armiy Rais

Reported by Suhainah Wahiduddin

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] This is a case where the plaintiff was the claimant in an adjudication proceeding and the learned adjudicator, Mr Ramdas Tikamdas ('adjudicator') in his decision dated 6 January 2023 ('AD'), had dismissed the plaintiff's claim.

[2] Not surprisingly, the plaintiff then applied to set aside the AD ('setting aside application', encl. 1). The provisions invoked by the plaintiff were s. 15(b) and (d) of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') and O. 69A, rr. 2, 3 and 7 of the Rules of Court 2012 ('RC 2012').

[3] The plaintiff also applied to stay the AD pending the determination of the setting aside application pursuant to para. 16(1)(a) of the CIPAA and O. 69A, rr. 2 and 4 of the RC 2012 ('stay application', encl. 6). An *ad interim* stay of the AD was granted by the court after hearing brief oral submissions by the learned counsels who represented the parties. On a subsequent date, the learned counsels agreed with the court that, in view of the wordings of prayer 1 in the stay application, there is no necessity for a hearing to be held. The court accordingly granted the prayer for an order to stay the AD until disposal of the setting aside application, with cost in the cause.

[4] After having considered the cause papers and submissions of the parties, I had allowed the setting aside application in its entirety.

[5] The defendant is aggrieved with the decision, and I now provide my full grounds for the same.

A **The Cause Papers**

[6] Apart from encl. 1, the cause papers are as follows:

(i) the plaintiff's affidavit in support ('AIS') affirmed by its chief executive director and director, Low Hui Ying on 19 January 2023 (encls. 2 to 4);

B (ii) the plaintiff's supplemental affidavit affirmed by the same deponent on 31 January 2023 (encl. 10);

(iii) the defendant's ('AIR') affirmed by its director, Chang Hon Nyan on 13 February 2023 (encl. 13);

C (iv) the plaintiff's AIR affirmed by the same deponent on 21 February 2023 (encl. 16); and

(v) the plaintiff's notice of intention to use affidavit (encl. 10) dated 21 February 2023 (encl. 18).

D **Background Facts**

[7] The plaintiff is a private limited company with a registered address at No. 56, Jalan Kempas Utama 2/2, Taman Kempas Utama, 81200 Johor Bahru and a business address at No. 11, Jalan Impian Emas 18, 81300 Skudai, Johor. The plaintiff is in the contracting business.

E **[8]** The defendant is similarly a private limited company having its registered address at 15-11, Q Sentral, 2A, Jalan Stesen Sentral 2, KL Sentral, 50470 Kuala Lumpur and business address at Oval Damansara, Unit 13-11 & 12, Menara Permata Damansara, No. 685, Jalan Damansara, 60000 Kuala Lumpur. The defendant is a property developer.

F **[9]** By a letter of award dated 29 October 2018 ('LoA'), Archiconic Sdn Bhd, on behalf of the defendant, awarded the plaintiff the contract for the construction and completion of the main building works for the project known as "Cadangan Pendirian Bangunan Komersial 20 Tingkat Dan 1 Tingkat Separa Bawah Yang Mengandungi:

G (a) 25 Unit Kedai Di Tingkat Bawah

(b) 50 Unit Pejabat Di Tingkat 1 Dan 2

(c) Ruang Konvensyen Di Tingkat 6

H (d) 111 Bilik Hotel Bajet (Jenis A, A1, B Dan C) Di Tingkat 6, 7 Dan 8

(e) 8 Tingkat Tempat Letak Kereta Di Tingkat Separa Bawah Hingga Tingkat 6 Dengan Kemudahan Penduduk Di Tingkat Podium

(f) 13 Tingkat 305 Unit Pangsapuri Perkhidmatan Di Podium Hingga Tingkat 19

I Di Atas Lot 1259, Bandar Country Homes, Mukim Rawang, Daerah Gombak, Majlis Perbandaran Selayang, Selangor Darul Ehsan ('Project').

[10] The contract sum is RM92,356,854.10 with RM56,115,454.10 to the plaintiff, RM34,241,400 to the Nominated Sub-Contractors ('NSC') and a contingency sum of RM2,000,000.

[11] The parties agreed that the agreement and conditions of the PAM contract 2006 (with quantities) ('PAM contract') shall form part of the contract made between them.

[12] Pursuant to cl. 4 of the LoA, the completion date for the project is 31 October 2020 or 24 months from the actual date of handover of site, whichever is later, and that there shall be no sectional completion under the contract.

[13] Clause 8 of the LoA on "terms of payment" provides, among others, that the plaintiff shall submit a monthly progress claim to the superintending officer ('SO') accompanied with all relevant documents by way of evidence to enable the quantity surveyor to evaluate and certify, before payments are made progressively against progress claim certificates (on a monthly basis) by the defendant to the plaintiff. All progress claims are subjected to a 60-day honouring period commencing from the date of receipt of the plaintiff's submission of the SO's certificate to the defendant for payment.

[14] A dispute arose between the parties due to, among others, the purported non-payment of the sums certified in Interim Certificates Nos. 30 to 37 issued by the plaintiff to the defendant from September 2021 to April 2022 amounting to RM9,208,150.21, notwithstanding that the 60-day honouring period for each interim certificate had lapsed.

[15] On 4 August 2022, the plaintiff served the undated payment claim to the defendant by hand. The defendant served the payment response dated 16 August 2022 to the plaintiff by email on 17 August 2022 and by registered post on 22 August 2022.

[16] Following the appointment of the adjudicator, the following documents and submissions were submitted to the adjudicator and exchanged between the parties:

(i) adjudication claim dated 25 October 2022;

(ii) adjudication response dated 9 November 2022;

(iii) adjudication reply dated 16 November 2022;

(iv) the defendant's rejoinder dated 29 November 2022; and

(v) the plaintiff's adjudication reply to rejoinder dated 5 December 2022.

[17] The adjudicator's conclusions following his findings, and his decision can be found in the following paragraphs of the AD:

> 108. ...
>
> (1) The claimant is entitled to the outstanding sum of RM9,208,150.21 as stated in Paragraph 42 above;

(2) All other claims by the claimant are dismissed;

(3) The respondent is entitled to set-off to diminish or extinguish the claimant's claim as follows:

(a) the refund of sum of RM8,420,854.71 in respect of the Deed of Assignment of Proceeds paid to Hong Leong Bank Berhad as stated in Paragraph 75 above;

(b) the sum of RM7,877,832.00 for rectification of defective works as stated in Paragraph 82 above.

109. Accordingly, the total set-offs that the respondent is entitled to is the sum of RM16,298,686.71 which is more than the claimant's succeeded amount of RM9,208,150.21.

...

112. Based on the authorities above, I Find And Hold that the claimant's claim in this adjudication proceeding has been zerorised.

...

119.

(1) The claimant's claim *vide* its payment claim is hereby zerorised and dismissed.

(2) Pursuant to CIPAA Section 18(1) and in accordance with the principle that costs follow the event, the claimant is hereby ordered to pay costs of RM109,995.14 to the respondent within fourteen (14) calendar days of the date of this Adjudication Decision.

(3) Pursuant to Section 25(o) of CIPAA, the claimant is hereby further ordered to pay interest at the simple interest rate of 5% per annum an [*sic*] any unpaid part of those costs beginning on the fifteenth (15th) calendar day after the date of this Adjudication Decision and continuing until the costs are completely paid.

The Setting Aside Application

[18] An adjudication decision is binding unless, among others, it is set aside by the High Court on any of the grounds referred to in s. 15 of the CIPAA (see s. 13 of the CIPAA).

[19] In the AD, the adjudicator had identified six main issues for his consideration arising from the adjudication papers. In the original prayer (A) in encl. 1, the plaintiff applied to set aside part of the AD namely:

(i) paragraphs 45 and 46 which pertain to the adjudicator's finding on the second issue as to whether the plaintiff is entitled to the outstanding sum of RM562,702.24 for Interim Certificates Nos. 25, 26, 29, 30, 31 and 32 due to the set-off against properties to be transferred to the plaintiff (contra units of service apartments at Bandar Country Home) not having been completed by the defendant (see too, paras. 9 to 11 of the payment

claim). The adjudicator was not persuaded that the conduct of the parties in the circumstances of the case amounted to an alteration or variation of the express written terms. Accordingly, the effective date of transfer of the contra unit would be during the release of the first moiety of the retention sum which was not yet due as at the date of the payment claim. The adjudicator found that the plaintiff is not entitled to the sum of RM562,702.24;

(ii) paragraphs 55 to 58 and 60 concerning the adjudicator's analysis and findings on the third issue on whether the plaintiff is entitled to the outstanding payment of RM13,476,416.62 or any part thereof for Progress Claim No. 38 ('PC 38') which has not been certified (see too, paras. 12 to 14 of the payment claim). Even though the adjudicator found that PC 38 was not due for payment on the date of service of the payment claim on 4 August 2022, he went on to discuss the disputes raised by the defendant in respect of PC 38, specifically on the measurement of quantities for the major disputed items and held that the plaintiff has not proved its claim for the same. The adjudicator additionally discussed the defendant's contentions in respect of the plaintiff's claim for loss and expense and again, he found that the plaintiff has not proved its claim;

(iii) paragraphs 62 to 75 as regards the adjudicator's analysis and findings on the fourth issue as to whether the defendant is entitled to set-off the sum of RM8,420, 854.71 which has been paid to Hong Leong Bank Berhad ('HLBB') for Interim Certificates Nos. 27, 28 and 29 pursuant to the deed of assignment of proceeds under the specific control financing line (SCFL)/overdraft/progressive claim (OD/PC)/post-financing (see too, paras. 72 to 83 of the adjudication response). The adjudicator determined that the defendant is entitled to the refund of RM8,420,854.71 from the plaintiff and that it shall be treated as a valid set-off in respect of the plaintiff's claims in the adjudication proceeding;

(iv) paragraphs 77 to 82 as to the adjudicator's analysis and findings on the fifth issue on whether the defendant is entitled to set-off the sum of RM22,264,544.76 or any part thereof for costs incurred or to be incurred by the defendant to engage a third-party contractor for rectification works and to complete the works. The adjudicator concluded that based on the circumstances of the case and the contemporaneous documents filed in the adjudication proceeding, the defendant is entitled to set-off the sum of RM7,877,832 for rectification of defective works;

(v) paragraphs 117 and 118 which relate to the adjudicator's findings on costs of the adjudication proceedings whereby the whole of the adjudicator's fee and AIAC Administrative Fee and other registration fees shall be fully borne by the plaintiff. The total amount of costs is RM109,995.14; and

(vi) paragraphs 119(1), (2) and (3) as quoted in para. 17 above.

[20] On the first hearing date, I directed the learned counsels to file brief submissions on the question whether the court has power to set aside part of the AD since they did not address this issue in the prior written submissions. The plaintiff's further submissions and the defendant's supplemental submission are in encls. 31 and 29, respectively.

[21] The plaintiff referred to the case authorities of *BM City Realty & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case* [2016] CLJU 1096; [2016] 1 LNS 1096; [2016] MLJU 1567; *Naza Engineering & Construction Sdn Bhd v. SSL Dev Sdn Bhd* [2019] CLJU 2331; [2019] 1 LNS 2331; [2020] 9 MLJ 499 and *MRCB Builders Sdn Bhd v. SMM Resources Sdn Bhd & Another Case* [2021] MLJU 1856 in submitting that Malaysian jurisprudence favours severance of an adjudication decision and enforcement of the uncontaminated part of the same.

[22] The plaintiff then relied on the case of *Syarikat Bina Darul Aman Bhd & Anor v. Government Of Malaysia* [2018] 4 CLJ 248 in arguing that its complaint in relation to the adjudicator's decision on PC 38 is similar to the said case whereby:

(i) flowing from the reasoning of the learned judge in *Syarikat Bina Darul Aman*, the adjudicator in the present case ought to strike out PC 38 rather than deciding on the same; and

(ii) the purpose of the plaintiff's objection to the adjudicator's finding on PC 38 is to preserve its right to re-commence an adjudication in respect of such claim.

Hence, the AD should be set aside in part.

[23] As regards the decision in *Naza Engineering* (*supra*), Mr KA Gan submitted that *Syarikat Bina Darul Aman* has not been overruled; the learned judge's decision in *Syarikat Bina Darul Aman* comes after *BM City Realty* (*supra*) which means that the former would carry more weight than the latter; the factual matrix of the instant case is closer to *Syarikat Bina Darul Aman* than other cases; and *Naza Engineering* can be distinguished as it does not concern an adjudicator's assessment of a claim in excess of jurisdiction.

[24] Learned counsel further relied upon the judgments in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369 and *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499 and the explanatory statement on the construction industry payment and adjudication bill in submitting that the CIPAA, being a piece of social legislation, ought to be interpreted liberally to achieve the objective of the statute. The liberal and reasonable interpretation of s. 15 of CIPAA advocated was that such part(s) of an adjudication decision which has erred in law can be set aside.

[25] For the defendant, Mr SL Ong chose to cite my decision in *MRCB Builders* (*supra*) where I had echoed the views as expressed in *Naza Engineering* (see too, the decision by this court in *Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd And Other Cases* [2022] CLJU 1842; [2022] 1 LNS 1842; [2022] MLJU 1951) in submitting that the present case falls within the second scenario as stated in *Naza Engineering*, namely it concerns the setting aside application without an application made by the defendant under s. 28 of the CIPAA. Therefore, the court has no power to set aside part of the AD pursuant to s. 15 of the CIPAA.

[26] After deliberating on the parties' submissions, I was not persuaded that the AD can be set aside in part because there is no application under s. 28 of the CIPAA and thus, the current suit falls within the second scenario as explicated in *Naza Engineering*, and in the absence of express words in the CIPAA, the court has no power to set aside part of the AD as sought in the original prayer (A) in encl. 1. However, in encl. 31, the plaintiff had also submitted that the said prayer (A) may be amended to set aside the entire AD in the event that the court takes the view that the AD cannot be set aside in part.

[27] On the clarification date, I enquired as to the defendant's stand on the plaintiff's submission and Mr SL Ong requested a short date to take instructions. When the case was called up two days later, learned counsel informed that the defendant is agreeable to the amendment as proposed by the plaintiff. Prayer (A) in encl. 1 was thus allowed to be amended to reflect the plaintiff's application for the entire AD to be set aside.

[28] The plaintiff advanced the following grounds in support of the setting aside application:

(i) that the adjudicator had acted in excess of jurisdiction when he:

  (a) decided that PC 38 was not due for payment, but yet he proceeded to assess the parties' submissions and concluded that the plaintiff has not proven its case for measurement of quantities and claim for loss and expense and retention sum; and

  (b) allowed the set-off for the refund of RM8,420,854.71;

(ii) that there is denial of natural justice and a breach of sub-s. 12(4) of the CIPAA when the adjudicator refused to award the sum of RM562,702.24 to the plaintiff on account that the effective date of the transfer of contra units is not yet due without giving any or sufficient reasons; and

(iii) that the adjudicator acted in excess of jurisdiction and/or in breach of the second rule of natural justice in allowing the defendant's claim for the purported rectification of defective works amounting to RM7,877,832.

[29] Each of the abovementioned grounds shall be discussed in turn.

Analysis And Findings Of The Court

First Ground: Whether The Adjudicator Had Acted In Excess Of Jurisdiction When He:

(a) Decided That PC 38 Was Not Due For Payment, But Yet He Proceeded To Assess The Parties' Submissions And Concluded That The Plaintiff Has Not Proven Its Case For Measurement Of Quantities And Claim For Loss And Expense And Retention Sum; And

(b) Allowed The Set-off For The Refund Of RM8,420,854.71

[30] In respect of the first ground (a) above, the plaintiff submitted PC 38 to the defendant for the sum of RM13,476,416.62 on 15 July 2022 being RM11,122,293.13 for the plaintiff and RM2,354,123.49 for the NSC. This is an amended and re-submission of Progress Claim No. 38 dated 13 May 2022.

[31] PC 38 is the final account prepared by the plaintiff consequent to the plaintiff's notice of own determination dated 25 April 2022 ('25 April 2022 notice') in accordance with clause 26.2 of the PAM contract following the defendant's purported failure to make payments for the certificate of payment within the stipulated time.

[32] The plaintiff contended that, pursuant to clause 8 of the LoA, a progress claim certificate should have been issued within 14 days of 15 July 2022, *ie*, on 29 July 2022 (see paras. 12 to 14 of the payment claim and 13 to 19 of the adjudication claim).

[33] The defendant retorted, among others, that the submission of PC 38 is merely to facilitate the preparation of the final account and that the plaintiff itself has affirmed that PC 38 shall be subjected to the procedure as set out in clause 26.6 of the PAM contract which reads as follows:

> The Contractor shall within six (6) Months after determination of his own employment, submit to the Employer, Architect and Quantity Surveyor for the Employer's agreement, a final account for the total value of work properly executed, the value of materials and goods supplied and loss and/or expense suffered by the Contractor caused by such determination.
>
> 26.6(a) If nothing in the said final account is disputed by the Employer within three (3) Months from the date of receipt of the final account from the Contractor, the final account shall be conclusive and deemed agreed by the parties. If the amount in the final account exceeds the sums previously paid to the Contractor under the Contract (less any Liquidated Damages and set-off which the Employer is expressly entitled under the Contract), the

balance shall be a debt payable to the Contractor by the Employer within the Period of Honouring Certificates. If the said amount is less than the said sum, the difference shall be a debt payable to the Employer by the Contractor or where applicable, the Employer may recover such difference from the Performance Bond.

26.6(b) If the Employer disputes the final account, the Employer shall give written notice to the Contractor setting out any disagreement complete with particulars within three (3) Months of the date of receipt of the final account from the Contractor. The Contractor shall within three (3) Months from the date of receipt of the grounds of dispute, either make such amendment to the final account as in his opinion may be appropriate, or decide not to amend the final account. In the event the Employer disagrees with the amended final account or the decision not to amend the final account, the Employer shall refer the dispute to arbitration under Clause 34.0 within three (3) Months from the date of receipt of the amended final account or decision not to amend the final account. Failure to refer the dispute to arbitration within the stipulated time, the final account or amended final account shall deem to be conclusive and agreed by the parties.

Hence, the deadline for the defendant to indicate its agreement or otherwise to the plaintiff's final account is 15 October 2022, which is three months upon receipt of PC 38 (see para. 47 in the adjudication response).

[34] The plaintiff agreed to the defendant's statement (see para. 50 of the adjudication reply where the plaintiff said that the defendant shall have three months to respond to the plaintiff's final account which lapsed on 15 October 2022).

[35] The common position taken by the parties did not escape the adjudicator's attention when he adverted to this in para. 53 of the AD and found that "... the deadline for the parties to agree to the final account is 15 October 2022. Pursuant to clause 26.6(a) of the PAM contract, it is only on that date that "the final account shall be conclusive and deemed agreed by the parties". That being the case, on the date of service of the payment claim on 4 August 2022, i find and hold that the Progress Claim No. 38 was not due for payment and the claimant is not entitled to the same.".

[36] In this court, Mr SL Ong cited ss. 5, 6, 13 and 27 of the CIPAA and the case authorities of *Bertam Development Sdn Bhd v. R & C Cergas Teguh Sdn Bhd* [2017] CLJU 1556; [2017] 1 LNS 1556; *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd & Other Cases* [2018] CLJU 1459; [2018] 1 LNS 1459; *SKS Pavillion Sdn Bhd v. Tasoon Injection Pile Sdn Bhd* [2019] 2 CLJ 704; *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018]

2 MLJ 22 and *PJ Midtown Development Sdn Bhd v. Pembinaan Mitrajaya Sdn Bhd & Another Case* [2020] CLJU 1254; [2020] 1 LNS 1254 to support the submission that the adjudicator did not act in excess of his jurisdiction as he has jurisdiction on the matters as set out in the payment claim, payment response, adjudication claim and adjudication response.

[37] According to the defendant, the plaintiff raised the issue of PC 38 and, in reply, the defendant raised the defence that PC 38 was not due for payment. Following this, the adjudicator made a finding in paras. 47 to 56 of the AD in accordance with the plaintiff's payment claim. The plaintiff's complaints are said to be nothing more than on the inclusion, exclusion and assessment of evidence, error in the findings of fact and/or in the inference from evidence, which are not grounds to set aside the AD under s. 15(d) of the CIPAA.

[38] The defendant even contended that what is contained in paras. 55 and 56 of the AD are "*obiter dictum*" and would not affect the finding that PC 38 is a premature claim.

[39] The thrust of the plaintiff's submission is that the adjudicator had ruled on contingent jurisdiction. This type of jurisdiction was elucidated in *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd And Another Case* [2017] CLJU 177; [2017] 1 LNS 177; [2017] MLJU 242 to mean the existence of valid jurisdiction is dependent on further compliance with the requirements of the CIPAA in that the dispute must be one falling within the matter raised in the payment claim and payment response as provided under sub-s. 27(1) of the CIPAA or under sub-s. 27(2) of the CIPAA whereby the parties have agreed in writing to extend the adjudicator's jurisdiction to adjudicate the dispute in question.

[40] The Federal Court in *View Esteem* (*supra*, at p. 41) explained that the "matter" in sub-s. 27(1) of the CIPAA which defines or limits the adjudicator's jurisdiction refers to the subject matter of the claim or cause of action identified by the unpaid party in the payment claim and that the response in a payment response is defined and limited by the said claim or cause of action in the payment claim (see too, *Construction Adjudication In Malaysia*, 3rd edn, Sweet & Maxwell, 2022 by Lam Wai Loon and Ivan YF Loo at pp. 283 to 284 and 430 to 433).

[41] In the instant case, the defendant's payment response merely denied the plaintiff's claims and allegations in the payment claim which were said to be baseless and completely misconceived, and without full and complete particulars being given by the plaintiff. The payment response also mentions the defendant's notice of arbitration dated 1 June 2022 which was awaiting response from the plaintiff's solicitors.

[42] Although the defendant did not raise all defences in the payment response, it is still able to do so in the adjudication response and the adjudicator is obliged to consider these defences (see paras. 65, 66 and 74 in *View Esteem* (*supra*, at pp. 43, 44 and 47)). The allegation of a premature claim by the plaintiff was raised by the defendant in the adjudication response and the adjudicator addressed the said contention, rightly finding that PC 38 was not due for payment as at the date of service of the payment claim.

[43] Notwithstanding this finding, the adjudicator said in para. 54 of the AD that he shall, nevertheless, set out the disputes raised by the defendant in respect of PC 38. As submitted by Mr SL Ong, the adjudicator did not state that he does not have jurisdiction to decide on the plaintiff's claims under PC 38. Neither did he refer to the provision in sub-s. 27(3) CIPAA.

[44] It is trite that an adjudicator does not have the jurisdiction or the power to make a binding decision on his own jurisdiction. In *ATSA Architects Sdn Bhd v. Teguh Majuria Sdn Bhd & Other Cases* [2022] CLJU 3037; [2022] 1 LNS 3037; [2022] MLJU 3329, this court said:

> [59] The adjudicator does not have the jurisdiction or the power to make a binding decision on his own jurisdiction unless the parties agree in writing to extend the jurisdiction of the adjudicator pursuant to sub-s. 27(3) CIPAA. When a jurisdictional objection is raised by a party in an adjudication proceeding, the adjudicator may exercise his discretion to proceed with, and complete, the adjudication proceedings without prejudice to the rights of any party to subsequently apply to set aside the adjudication decision under s. 15 CIPAA or to oppose the application for enforcement of the adjudication decision under sub-s. 28(1) CIPAA. When an adjudicator decides to exercise his discretion under sub-s. 27(3) CIPAA, he is not obliged to give his reasons for concluding that he does have jurisdiction. If reasons are given, these would not have any legal effect and would not bind the parties (see *VVO Construction Sdn Bhd v. Bina MYK Sdn Bhd And Another Appeal* [2017] 1 LNS 2179, *Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd* [2018] MLJU 861 and *Construction Adjudication in Malaysia*, Second Edition, Sweet & Maxwell, 2018 by Lam Wai Loon and Ivan YF Loo at pp 285 - 287).

(see too, para. 53 in *Wabina Constructions & Engineering Sdn Bhd v. Fulloop Sdn Bhd & Other Cases* [2022] CLJU 2608; [2022] 1 LNS 2608; [2022] MLJU 2744).

[45] As I have found that PC 38 was not due for payment as at the date of service of the payment claim, the adjudicator's conclusion as expressed in para. 60 of the AD, as a result of his analysis of the parties' submissions on the issues relating to measurement of quantities, and the claims for loss and expense and retention sum where he decided that the plaintiff has failed to prove these claims, and he declined to award the sums in PC 38 to the plaintiff, cannot stand as it was made in excess of his jurisdiction.

[46] The plaintiff relied on the decision by the Court of Appeal in *JKP Sdn Bhd v. Anas Construction Sdn Bhd & Another Appeal* [2022] 10 CLJ 528; [2022] 6 MLJ 503 in arguing that the rationale behind setting aside the adjudication decision as a whole in that case rests on, *inter alia*, lack of contingent jurisdiction as the adjudicator had decided the adjudication on a clause of the contract which was not relied upon by the claimant in the payment claim and adjudication claim. The Federal Court has since affirmed the decision of the Court of Appeal by a majority of 2:1 (see *Anas Construction Sdn Bhd v. JKP Sdn Bhd & Another Appeal* [2024] 2 CLJ 665; [2024] MLJU 53; [2024] 2 MLJ 543 although my personal inclination is for the dissenting judgment by Mary Lim Thiam Suan FCJ).

[47] I therefore find and hold that the plaintiff has established the ground to set aside the AD as per the first ground (a).

[48] With regards to first ground (b), as mentioned earlier, in paras. 72 to 83 of the adjudication response, the defendant had raised the defence that it had overpaid the plaintiff in the sum of RM8,420,854.71 under Interim Certificates No. 27, 28 and 29 to the designated account with HLBB on 28 April 2022 in accordance with the deed of assignment of proceeds dated 16 May 2019 between the plaintiff and HLBB and the notice of assignment dated 24 May 2019 issued by the plaintiff and HLBB to the defendant. The defendant contended that such payment shall effectively discharge the obligation to pay the plaintiff under the contract and hence, the sum of RM8,420,854.71 shall be deemed to be part of the payment to the plaintiff.

[49] In para. 75 of the AD, the adjudicator decided that the defendant is entitled to the refund of RM8,420,854.71 from the plaintiff and as this amount has not been paid by the plaintiff to the defendant, it shall be treated as a valid set-off in respect of the plaintiff's claims in the adjudication proceeding.

[50] The defendant asserted that the adjudicator's act did not amount to an excess of his jurisdiction as the plaintiff's own determination of the contract does not prohibit the defendant from setting off the overpayment to the plaintiff under Interim Certificates No. 27, 28 and 29.

[51] However, I am persuaded by the plaintiff's submission that the adjudicator acted in excess of jurisdiction in allowing the set-off for the refund of RM8,420,854.71 because of the defendant's cause of action:

(i) arose at the time when the debt could first have been recovered by action (see *Nasri v. Mesah* [1970] CLJU 85; [1970] 1 LNS 85; [1971] 1 MLJ 32), namely, when the alleged payment was made on 28 April 2022. However, the plaintiff had issued the 25 April 2022 notice. The adjudicator did not carry out any analysis with a view of making a finding as to whether the plaintiff's determination of the contract is

invalid and unlawful as alleged by the defendant in the adjudication response. This is a relevant enquiry because, if the plaintiff's termination of the contract is valid, the defendant's cause of action only accrued after the said termination. In fact, by finding that the defendant has three months to indicate its agreement or otherwise to the plaintiff's final account and that PC 38 is premature, the adjudicator appears to have accepted that the plaintiff's termination of the contract is valid; and

(ii) is based on an alleged overpayment. In *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242, Salleh Abas LP illuminated on "what is set-off?" in these words:

> A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. ... Whether or not the plea is a set-off it has to be determined as a matter of law and substance: *Hanak v. Green* [1958] 2 QB 9. A cross-claim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiff's claim. See *In re A Bankruptcy Notice* [1934] Ch 431. But to constitute a set-off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause or matter ... .

Hence, to constitute a set-off, the matter raised by the defendant must be such that it is proper to be dealt with as a defence to the plaintiff's claim. However, the defendant's submissions in the Adjudication Response are in relation to an overpayment on its part following the execution of documents pertaining to the assignment of the proceeds and all rights, interests and benefits under the contract. These contentions are a separate cause or matter which are unrelated to the disputes referred to in the adjudication proceedings.

[52] In my considered view, plaintiff has similarly proven, on a balance of probabilities, first ground (b). The adjudicator acted in excess of jurisdiction when he allowed the sum of RM8,420,854.71 to be treated as a valid and rightful set-off in respect of the plaintiff's claims in the adjudication proceedings.

Second Ground: Whether There Is Denial Of Natural Justice And A Breach Of Subsection 12(4) Of The CIPAA When The Adjudicator Refused To Award The Sum Of RM562,702.24 To The Plaintiff

[53] One of the duties and obligations of the adjudicator is to comply with the principles of natural justice (see s. 24(c) of the CIPAA).

[54] Denial of natural justice as one of the grounds where an adjudication decision may be set aside as provided in limb (b) of s. 15 of the CIPAA whilst sub-s. 12(4) of the CIPAA stipulates that the adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

[55] It is well-accepted that natural justice in the context of s. 15(b) of the CIPAA refers to the second pillar of natural justice that the parties must be given adequate notice and opportunity to be heard. Basically, the line of enquiry which is undertaken by the courts in determining whether there is a denial of natural justice is to consider the manner in which the adjudicator conducted the hearing and whether he has accorded procedural fairness to the parties (see among others, *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] CLJU 1522; [2016] 1 LNS 1522; [2016] MLJU 1776; *Bauer (Malaysia) Sdn Bhd v. Jack-In Pile (M) Sdn Bhd & Another Appeal* [2018] 10 CLJ 293; *Ireka Engineering and Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal* [2019] CLJU 51; [2019] 1 LNS 51; *Meridian Contracts Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Case* [2020] CLJU 1250; [2020] 1 LNS 1250; [2020] MLJU 1405 and *MRCB Sentral Properties Sdn Bhd v. GSIB Sdn Bhd & Another Case* [2021] MLJU 2249).

[56] The plaintiff's claim for the sum of RM562,702.24 is set out in paras. 9 to 11 in the payment claim and paras. 8 to 10 in the adjudication claim.

[57] Essentially, the parties had initially agreed for certain units in the Rawang service apartment to be transferred by the defendant to the plaintiff to contra the value of works done for the project in the sum of RM2,645,472.60. In the plaintiff's letter to the defendant dated 2 October 2018, the plaintiff proposed that this arrangement be subject to the following:

(i) To offset RM 264,547.30 during 1st Interim Certificate.

(ii) To offset RM 2,80,925.30 during release of 1st Moiety of Retention.

[58] The plaintiff further relied on the letters dated 1 September 2021, 8 October 2021, 3 November 2021 and 7 December 2021 which it had issued to the defendant ('set-off notifications') to show that the parties had, by conduct, departed from the above mentioned contra arrangement and instead agreed for the contra properties to be offset based on the interim payment certificate Nos. 25, 26, 29, 30, 31 and 32.

[59] The plaintiff argued that the intended contra amount of RM562,702.24 became due and payable to the plaintiff as the defendant has not transferred the properties or evinced an intention not to proceed with the transfer of the properties to the plaintiff.

[60] The plaintiff took issue with the adjudicator's finding on this matter in para. 45 of the AD that:

> After considering the rival contentions of the parties, I am not persuaded that the conduct of the parties in the circumstances of the case amounts to an alteration or variation of the express written terms. Accordingly, the effective date of transfer of the contra unit in Rawang Service Apartment would, as agreed by the parties, be during release of 1st Moiety of Retention and is not yet due as at the date of the payment claim.

by submitting that the adjudicator failed to attach sufficient weight to the plaintiff's submissions and the set-off notifications and to explain his reasoning in arriving at his finding.

[61] Learned counsel for the defendant submitted that whether there has been a denial of natural justice depends on whether a party has been prevented from tendering evidence or to make a submission regarding any issue which has been raised in an adjudication. In this case, there has been no denial of natural justice as the adjudicator was well aware of the decision in *View Esteem* which held that an adjudicator must consider all defences raised by the respondent in the adjudication response even if such defence was not raised in the payment response.

[62] Besides, the parties were not prevented from tendering evidence or making submissions and they had prior notice and an effective opportunity to make representations before the adjudicator delivered the AD. In any event, the adjudicator had considered the issues on the alleged outstanding sum of RM562,702.24.

[63] In my opinion, whilst the adjudicator appears to have considered the respective submissions of the parties (see paras. 25, 34(7) and 35(3) of the AD where references are made to the adjudication claim, adjudication response and adjudication reply and the discussion of the second issue in paras. 43 and 44 of the AD), there is merit to the plaintiff's complaint that the adjudicator failed to give adequate or sufficient reasons in finding that the parties' conduct did not amount to a variation of the express written terms as argued by the plaintiff.

[64] In *JEKS Engineering Sdn Bhd v. PALI PTP Sdn Bhd And Another Case* [2021] CLJU 1406; [2021] 1 LNS 1406; [2021] MLJU 1627, this court said that:

> [41] Sub-s. 12(4) CIPAA provides that ... This requires, at a minimum, for the adjudicator to give a statement of his reasons in arriving at the conclusion as he did. The reasons may be simple and succinct, but they must be coherent so that a reasonable reader can understand the reasoning in respect of each issue that require his determination. The reasons may be wrong in fact or in law but that does not give rise to an effective challenge under limb (b) of s. 15 CIPAA. Failure to explicitly deal with a substantial element of the defence raised by the respondent in an adjudication proceeding may render the adjudication decision liable to be set aside (see, among others, *Balfour Beatty Engineering Services (HY) Ltd v. Shepherd Construction Ltd* [2009] EWHC 2218 (TCC); *Thermal Energy Construction Ltd v. AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC); *Ranhill E & C Sdn Bhd v. Tioxide (M) Sdn Bhd And Other Appeals* [2015] MLJU 1873; and *Genting Malaysia Berhad v. PLM Interiors Sdn Bhd And Another Case* [2020] MLJU 344).

[65] In para. 45 of the AD, the adjudicator merely said that he is not persuaded by the plaintiff's contention without explaining his reasoning. In my considered view, this falls short of the duty under sub-s. 12(4) of the CIPAA to provide reasons for the adjudicator's findings in respect of the second issue which he had identified in the AD.

[66] I therefore find and hold that the plaintiff has established the second ground in the setting aside application on a balance of probabilities.

Third Ground: Whether The Adjudicator Acted In Excess Of Jurisdiction And/Or In Breach Of The Second Rule Of Natural Justice In Allowing The Defendant's Claim For The Purported Rectification Of Defective Works Amounting To RM7,877,832

[67] In the adjudication response, the defendant stated that, as a result of the plaintiff's breach or failure to complete the works, the defendant had incurred or will incur additional costs in engaging third party contractors to, among others, carry out defects rectification works amounting to RM7,877,832 (see paras. 56, 57, 60, 61, 62 and 63).

[68] The crux of the plaintiff's position on this matter as set out in paras. 64 and 67 of the adjudication reply is that the 25 April 2022 notice is lawful and hence, the defendant is not entitled to claim the costs of rectification and that, except for the non-compliance reports ('NCR') which were no longer required to be addressed, the plaintiff was carrying out the works to address the NCR but for the determination of its own employment due to non-payment by the defendant.

[69] The adjudicator dealt with the parties' submissions in paras. 77 to 82 under the fifth issue. The adjudicator expressly stated that he has not determined whether the 25 April 2022 notice or the defendant's termination on 10 May 2022 pursuant to cl. 25 of the PAM Contract is valid, nevertheless the defendant's claim for RM7,877,832 stands on a different footing than the claim for costs to complete the balance of the works as the defendant relied on 18 NCR and the quotation from Soman Construction dated 6 July 2022 ('quotation'). The adjudicator ultimately found that the defendant is entitled to set off the sum of RM7,877,832.00 for rectification of defective works.

[70] The plaintiff averred that there is a denial of the second rule of natural justice as the adjudicator had attached undue weight on the quotation and did not assess any evidence of the rectification of alleged defective works. Alternatively, it was contended that the adjudicator acted in excess of jurisdiction in allowing the defendant's right to set off arising from the purported rectification of defective works.

[71] I agree with the plaintiff's alternative submission. By not deciding on the validity of the 25 April 2022 notice, the question arises as to whether the defendant is entitled to claim for rectification of all defective works in the 18 NCR. In the event the plaintiff rightfully determined the contract, the plaintiff would not have been able to carry out the rectification works as vacant possession of the site has been handed back to the defendant.

[72] It is imperative for the adjudicator to decide on the legality of the 25 April 2022 notice and the defendant's termination notice before ruling on the defendant's entitlement for rectification of defective works. The adjudicator has no jurisdiction to decide on the defendant's entitlement for rectification of defective works without first deciding on the legality of the plaintiff's determination of its own employment.

[73] Hence, the adjudicator had acted in excess of jurisdiction in allowing the defendant's claim for RM7,877,832.

Conclusion

[74] Premised on the aforesaid considerations, the setting aside application was allowed.

[75] Costs of RM8,000 was ordered to be paid by the defendant to the plaintiff for both encls. 1 and 6, subject to allocatur. The plaintiff's prayer for interest at the rate of 5% per annum on the total amount of costs from the date of decision until full settlement was also allowed.